

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, by
LETITIA JAMES, Attorney General of the State of New York,

Plaintiff,

-against-

Index No. 451533/2019

**STIPULATION OF
SETTLEMENT AND
ORDER OF DISMISSAL**

DANIEL C. AUSTIN, SR., DANIEL C. AUSTIN, JR., DONALD M.
PFAIL, JOSEPH LODATO, MICHAEL W. MICHEL, ANTHONY R.
MORDENTE, AND VERA PRINCIOTTA,

Defendants.

This Stipulation of Settlement (“Stipulation”) is made and entered into as of the 5th day of February, 2024, by and among Defendant Michael Michel (“Defendant”) and the People of the State of New York, by Attorney General Letitia James (“Plaintiff” and, together with Defendant, the “Parties”):

WHEREAS, there is pending in the Supreme Court of the State of New York a Verified Complaint filed on September 3, 2019, in which Plaintiff asserts claims against Defendant pursuant to the Not-For-Profit Corporation Law (“N-PCL”) and the Estates, Powers and Trusts Law (“EPTL”) (the “Action”);

WHEREAS, Defendant has appeared in the Action, has served an Answer to the Verified Complaint, and has asserted a number of defenses to Plaintiff’s claims;

WHEREAS, Defendant filed a motion to dismiss the Verified Complaint on October 28, 2019, on the grounds that: (1) there is a defense founded upon documentary evidence and (2) the Verified Complaint fails to state a cause of action, and the Court denied the motion by Decision and Order dated January 29, 2021;

WHEREAS, discovery proceeded in this matter, including the exchange of documents and depositions of Defendant and other parties and witnesses;

WHEREAS, Defendant, through his counsel, and Plaintiff, through its counsel, have engaged in good faith, arms-length negotiations that led to this Stipulation, which embodies all of the terms and conditions of the settlement among the Parties;

WHEREAS, Defendant has agreed to enter into this Stipulation to avoid further expense, inconvenience, and the distraction of burdensome litigation, and to thereby put to rest with finality this controversy with Plaintiff;

WHEREAS, the Parties believe this Stipulation will advance the ability of Lutheran All Faiths Cemetery (the "Cemetery") to fulfill its mission and be in the best interest of the Cemetery's beneficiaries;

WHEREAS, the Parties have had a full opportunity to examine the facts and circumstances surrounding their respective decisions to accept the terms of this Stipulation and have not relied on any representations (or the lack thereof) made by any other party concerning the circumstances leading to this Stipulation;

NOW, THEREFORE, it is agreed by and among the Parties, in consideration of the mutual covenants contained in this Stipulation, the adequacy of which are hereby acknowledged, that all claims of the Plaintiff against the Defendant be settled, compromised, and dismissed on the merits and with prejudice, and without costs as to Plaintiff or Defendant, on the following terms and conditions, which the Parties respectfully request be so-ordered by the Court:

Undisputed Facts

Background

1. Defendant joined the Board of the Cemetery (the "Board") on March 17, 2014 and he resigned in November 2018.
2. Shortly after Defendant joined the Board, the New York State Division of Cemeteries began a routine audit at the Cemetery. The audit discovered financial irregularities, and the Division of Cemeteries referred its preliminary audit findings to Plaintiff, which commenced an

investigation through the Charities Bureau of the Office of the Attorney General and pursuant to the N-PCL and EPTL (the "Investigation"). Based on the findings of the Investigation, Plaintiff commenced the Action against certain current and former officers and directors of the Cemetery, including Defendant, for failing to properly administer the charitable assets entrusted to their care.

Improper Retirement Payout to Daniel Austin, Sr.

3. In May 2014, Defendant Daniel Austin, Sr. formally resigned his position as president and CEO of the Cemetery. Upon his resignation, Defendant Anthony Mordente authorized a payment of approximately \$900,000 to Austin, Sr. The Cemetery's Financial Statement for 2014 characterized the payment as the liquidation of a retirement trust created for Austin, Sr.'s benefit even though the terms of that trust agreement provided only an annual retirement pension payable in monthly installments.

4. The first disclosure to the full Board regarding Austin, Sr.'s 2014 award appears in the minutes to the June 2014 Board meeting: "[Donald] Pfail . . . reported that the funds held in [trust] for the benefit of Mr. Austin were fully distributed to him upon his retirement as President and Chief Executive Officer of the Cemetery." The June 2014 minutes do not record any consideration or ratification by the Defendant. Defendant had only just joined the Cemetery Board when the payment was made in May 2014.

Insufficient Board Oversight and Lack of Internal Controls

5. During the period from 2014 to 2018, the members of the Board, including Defendant, received multiple, express reminders from both the Cemetery's auditor and investment advisor about their fiduciary obligations to operate (i) in good faith, (ii) in a manner that they reasonably believed to be in the best interest of the corporation, and (iii) with such care, including reasonable inquiry, as an ordinarily prudent person would use in similar circumstances. Despite these warnings, the details of the Cemetery's financial performance and condition between 2014 and 2018 did not receive meaningful Board review.

6. Defendant and his fellow members of the Cemetery Board conducted no supervision, formal or informal, of the work performed by the Cemetery's executive team and regularly approved executive salary raises without any recorded basis for the increases and in spite of mounting cost pressures on the Cemetery's lawfully available operating funds. These findings were corroborated in February 2019 by a forensic auditor's report that noted:

- “[F]ormal compensation agreements do not exist for those in senior level management positions;”
- Authorization for particular compensation awards is only sporadically recorded, if at all, in Board meeting minutes; and
- “There does not appear to be a consistent program in place to determine executive and management compensation as it relates specifically to retention bonuses, retirement and deferred compensation plans, general performance bonuses, fringe benefits, severance, etc., whereby the aforementioned items are clearly stated, approved and monitored.”

7. Defendant also took no steps to ensure compliance with the Cemetery's conflict of interest policy, which expressly prohibited several significant transactions undertaken between 2014 and 2018. The policy, adopted in 2014, as required by N-PCL Section 715-a, requires Cemetery officers to observe “high standards of business and personal ethics in the conduct of their duties and responsibilities” and expressly identifies “acts that mix the personal or financial interests of an Interested Person with the interests of the Corporation” as indicative of a prohibited conflict of interest. The policy provides a detailed procedure for reviewing and documenting potential conflicts, and it requires periodic reviews to “ensure the [Cemetery] operates in a manner consistent with charitable purposes and does not engage in activities that could be construed as a violation of Section 715 of the [N-PCL].” The policy separately instructs that periodic reviews must expressly consider “[w]hether compensation arrangements and benefits are reasonable, based on competent survey information, and [the] result of arm's length bargaining.”

8. No periodic review of compensation, benefits, or potential conflicts occurred at the Cemetery between 2014 and 2018. Neither Defendant nor the other members of the Board identified or considered conflicts of interest present in various transactions as required by the

Cemetery's policy during that period.

9. In August 2018, Defendant and his fellow directors failed to place the Cemetery's interests ahead of other officers and directors when they permitted Chairman Daniel Austin, Sr. to personally repay funds stolen by his son, Daniel Austin, Jr., who was a director and officer of the Cemetery, without any confirmation of the amounts taken, admission of wrongdoing, or subsequent review of Austin, Sr.'s continued role as Chairman.

Investment in Personal Mortgage Loans to the Relatives of Cemetery Directors

10. The Cemetery's restricted trust assets are subject to the prudent institutional fund investment standards in N-PCL Article 5-A. Defendant, as a director of the Cemetery, was responsible for ensuring compliance with these investment standards, but he failed to do so.

11. The Cemetery's bylaws authorize the Board to invest in "such property, real, personal, or otherwise, including stocks, bonds or other securities, as the Board . . . may deem desirable." Between 2014 and 2018, the Cemetery's officers and directors maintained a long-standing practice of using restricted Cemetery assets to provide private mortgage loans to individual borrowers without any Board review of the collateral obtained, the loan terms offered, or the relative value of investment in mortgages versus traditional securities.

12. Between 2014 and 2019, Defendant and his fellow directors reviewed and approved Cemetery loans issued using restricted Cemetery assets. During this same period, the Board was on notice of its obligation to manage the Cemetery's mortgage lending responsibly. Despite being informed of their obligation to manage and invest the Cemetery's restricted charitable assets prudently, Defendant and the other members of the Board did not maintain any fixed standards by which they would solicit, select, and approve a new prospective borrower and investment loan.

13. The Cemetery's Board authorized lending restricted Cemetery assets directly to related parties in violation of N-PCL Section 715. In July 2015, the Cemetery closed an interest-only loan of \$400,000 to Defendant's daughters. The loan was to be used for the development of

a residential property in Queens and was formally agreed to by director Anthony Mordente, acting as attorney on behalf of the Cemetery, in a March 2015 loan commitment letter addressed to JLM LLC (Defendant's daughters were Janine and Laura Michel). At the time Mordente executed the commitment letter, the property to be developed still belonged to Defendant. There is no evidence that the Board considered this loan until June 2015, three months after the commitment letter, when Mordente first reported it to the Board as an already-agreed loan to two unidentified "borrowers who intend to build a house in Far Rockaway." Minutes from the June 2015 Board meeting do not record Board consideration of or inquiry into the loan terms or the borrowers' relationship to a sitting board member and they do not include a vote to approve the loan. The terms of the loan to the daughters of Defendant are set forth in a Mortgage Note, dated July 6, 2015, that provided for 6.25% percent interest per annum during the two (2) year term of the loan, with the payment of interest in the sum of \$2,083.33 to be made monthly commencing September 1, 2015, and continuing until August 1, 2017, with the entire principal balance due and payable on that date. The monthly interest payments as set forth in the Note were paid in full and in a timely manner and the entire principal balance was paid in full as required.

14. In July 2017, the Cemetery loaned \$500,000 to director Joseph Lodato's brother, at his request. There is no record in the meeting minutes for June or September 2017 of the members of the Board considering the loan terms, addressing the identity of the borrower and resulting conflict of interest, or voting to approve the loan. Defendant and the other members of the Board took no steps to examine whether the July 2017 loan was appropriate and in the best interests of the Cemetery.

15. The Cemetery's 2015 and 2017 loans to the family relatives of two sitting directors together withdrew nearly \$1 million from the Cemetery's restricted trust assets for the personal use and benefit of related parties. The Cemetery files for these loans do not include any record of the individual members of the Board, including Defendant, considering investment alternatives or assessing the reasonableness of particular loan terms to the Cemetery as required by N-PCL

Section 715. The loans violated the plain terms of the Cemetery Conflict of Interest policy.

Professional Fees Paid to Sitting Directors

16. In the over 4 years that Defendant served as a member of the Cemetery Board, no one at the Cemetery ever requested information or documentation to support the amounts billed to the Cemetery for Defendant Anthony Mordente's legal work and no one disputed the total amounts billed. Defendant took no steps in his capacity as a Board member to ensure an objective determination by disinterested officers or directors that the amounts paid to Mordente for legal work on behalf of the Cemetery were fair, reasonable, and in the Cemetery's best interests.

17. During Defendant's tenure on the Board, the Cemetery paid Mordente hundreds of thousands of dollars in professional fees at the same time that he was paid thousands of dollars in director fees. Beginning in 2014, Mordente also received an annual salary of \$100,000 for his position as Cemetery CEO. Mordente received a salary raise two years later in December 2016. These payments, executed without any substantive Board review, violated the terms of N-PCL Section 715 and the Cemetery's Conflict of Interest Policy.

18. Cemetery records indicate that during this same period time, Mordente also earned separate fees as Lender Legal Counsel at the Cemetery's mortgage loan closings. Those fees were deducted from the total loan proceeds paid to each borrower from restricted Cemetery assets at closing. Defendant never reviewed Mordente's role in these transactions or his associated fee during his tenure as a member of the Board.

Waste of Cemetery Assets

19. The Cemetery's outside auditor had identified operating costs as a concern and made explicit recommendations to the Board that the Cemetery take steps to reduce administrative spending. Despite those warnings, the Cemetery's operating expenses consistently increased without intervention by Defendant or other members of the Board.

20. In 2016, executive salaries, professional fees, director fees, and office expenses for

the Cemetery totaled approximately \$660,000 and consumed almost half (45%) of the total revenue from grave and niche sales for the year. In 2017, the same expenses totaled \$729,320 and represented 54% of the total revenue from grave and niche sales for the year. Defendant took no steps to review the reasonableness of the Cemetery payroll or office expenses during his tenure as a Director.

Invasion of the Perpetual Care Fund

21. The Cemetery regularly invaded the principal of its Perpetual Care Fund to support its overspending. This practice is expressly prohibited by the plain language of N-PCL Article 15.

22. N-PCL Section 1507(c) requires a cemetery corporation to keep, “separate and apart from its other funds, all moneys and property received . . . for the perpetual care of any lot,” and it instructs in plain language that the contents of the Perpetual Care Fund represent assets held in trust, so that the income from those funds shall be used “solely for the perpetual care and maintenance of the lots” while the principal remains inviolate.

23. During the relevant period, the Cemetery recited these restrictions annually in Note 1 to its Financial Statements. Note 1’s description of the Fund stated that “[t]he perpetual care fund consists of funds endowed to The Lutheran Cemetery for the annual care of graves. The principal of this fund is permanently restricted and only the income therefrom is applied against yearly maintenance charges.”

24. Despite their acknowledgment that the Perpetual Care Fund assets exist solely for the benefit of individual subscription lots and may not be used for general administrative expenses, Defendant and all of the other officers and directors of the Cemetery routinely violated this prohibition between 2014 and 2018 by approving withdrawals from the Cemetery’s Perpetual Care trust accounts to fund, among other things, director meeting fees, scheduled deposits into the Cemetery’s general operating account, vendor bill payments, and union pension contributions.

25. The members of the Board, including Defendant, were informed of their obligation

to refrain from spending Perpetual Care assets on ordinary administrative operating expenses and ignored multiple explicit warnings from the Cemetery's outside auditor. In March 2015, the Cemetery's outside auditor, Andrew Muhlstock, reported directly to the members of the Board, including Defendant, that the Cemetery "must decrease the amount of money withdrawn from the perpetual care fund to cover operating expenses." Mr. Muhlstock's warning is recorded in contemporaneous minutes created for the March 2015 meeting that were reviewed and adopted by the members of the Board.

26. In March 2017, Mr. Muhlstock reported to the members of the Board, including Defendant, that the Cemetery's General (Operating) Fund "owe[d] the Perpetual Care Fund the approximate sum of One Million (\$1,000,000.00) Dollars." Mr. Muhlstock's warning is recorded in contemporaneous minutes created for the March 2017 meeting that were reviewed and adopted by the members of the Board.

27. In March 2018, Mr. Muhlstock "cautioned the Cemetery that it is drawing funds from the Perpetual Care Fund in an amount greater than it is permitted to take." Mr. Muhlstock's warning is recorded in contemporaneous meeting minutes created for the March 2018 Board meeting that were reviewed and adopted by the members of the Board.

28. The Cemetery Financial Statements for each of the years from 2014 to 2017 confirm the continued drain from the Perpetual Care Fund: the annual audited statement of Cemetery Assets recorded inter-fund receivable amounts owed to the Perpetual Care Fund of \$962,660 (2013), \$1.3 million (2014), \$977,363 (2015), \$1.19 million (2016) and \$960,021 (2017) for the years 2013 to 2017, respectively. The members of the Board, including Defendant, were responsible for reviewing and approving each of these Financial Statements.

Stipulated Legal Conclusions

29. Defendant, in his capacity as a director of the Cemetery, owed the Cemetery fiduciary duties of care, loyalty, and obedience. In addition, Defendant was a trustee pursuant to EPTL Section 8-1.4 because he administered property for charitable purposes in the State of New York.

30. Defendant admits that he violated his fiduciary duties to the Cemetery as a member of the Board of Directors by failing to exercise sufficient oversight of the Cemetery's finances and by approving transactions that violated the plain terms of the N-PCL and the Cemetery's own Conflict of Interest Policy.

31. Defendant admits that he violated his fiduciary duties to the Cemetery as a member of the Board of Directors when he caused and/or permitted unlawful withdrawal of principal and income amounts from the Cemetery's Perpetual Care fund through a pattern and practice of transferring monies from the fund for use in meeting ordinary operating costs unrelated to the care of Cemetery lots associated with a perpetual care subscription.

32. Defendant further admits that the violations referred to in this section violated Sections 715, 717, and 1507 of the N-PCL and Section 8-1.4 of the EPTL and that, as a result of such violations, the Cemetery has been damaged.

Stipulated Relief

33. Defendant agrees that he will cooperate with the Attorney General fully and completely in the prosecution of the Action by the Attorney General against any other persons or entities connected with the Cemetery. Such cooperation shall include, among other things, voluntarily producing documents, meeting with the Attorney General to prepare for testimony, providing truthful testimony, including in pretrial depositions and at trial, and submitting truthful affidavits as requested by the Attorney General in connection with litigation concerning the Cemetery or any persons or entities connected to the Cemetery.

34. Pursuant to EPTL § 8-1.4(m) and N-PCL § 714, Defendant hereby accepts a permanent bar from service as an officer, director or trustee or in any position where he has any fiduciary responsibilities for any not-for-profit or charitable organization incorporated, registered, operating or soliciting contributions in New York, or for any other individual or entity that holds charitable assets or solicit charitable contributions in the State of New York, including, but not limited to, responsibility for financial and/or management oversight of any New York charitable entity. Notwithstanding this Stipulation, as long as Defendant is the President of Christ the King High School and required, by virtue of that role, to serve as an officer, director, or trustee of Christ the King High School and Christ the King Continuing Education, Defendant may do so provided he does not have responsibility for oversight of financial matters at either of those entities.

35. Defendant hereby agrees to pay restitution to the Cemetery in the amount of \$38,250 in director's fees earned during the period 2014 to 2018. Defendant further agrees that full payment of this restitution amount will be completed within sixty (60) days of the Effective Date of this Stipulation. Plaintiff shall deliver this restitution payment to the Cemetery as full compensation to the Cemetery for monetary losses and damages incurred as a result of the breaches of fiduciary duty outlined in paragraphs 29 to 32 above. It is further agreed by and among the Parties that, consistent with the principles outlined in General Obligations Law Section 15-108(b) and CPLR 1402, Defendant's payment of this restitution amount will be deemed by the Parties to fully satisfy his liability for any and all monetary losses and damages incurred by the Cemetery as a result of Defendant's conduct. It is further understood by and among the Parties that Plaintiff will not seek additional recovery from any other defendant in this action for economic losses caused by Defendant's conduct.

36. Dismissal of lawsuit with prejudice. Upon execution of the Stipulation by Defendant, Plaintiff will hold the Stipulation in trust pending receipt and clearance of the payment described in paragraph 35 by the Cemetery, at which time Plaintiff will execute the Stipulation and discontinue the Action with prejudice against Defendant by submitting this Stipulation to the Court to be so-ordered.

37. Resolution of all claims. This Stipulation resolves all outstanding claims by Plaintiff against Defendant asserted in or in connection with the Action. Plaintiff hereby agrees that it will seek no additional recovery or restitution of any kind from Defendant in connection with the Action, including, but not limited to, contribution under N-PCL Sections 719(c) and (d) for amounts recoverable from the remaining defendants in the Action subsequent to the execution of this Stipulation. Nothing in this Stipulation shall affect or limit Plaintiff's continuing claims against other defendants in the Action.

Additional Terms and Conditions

38. Defendant shall not take any action or make any statement denying, directly or indirectly, the propriety of this Stipulation or expressing any view that the claims against Defendant resolved in this Action are without a factual basis.

39. Plaintiff has agreed to the terms of this Stipulation based on, among other things, the representations made to Plaintiff by the Defendant and his undersigned counsel and the Attorney General's own factual investigation as set forth above. To the extent that any material representation made by the Defendant, directly or through his counsel, during the course of the Attorney General's Investigation and the Action, is later found to be inaccurate or misleading, this Stipulation is voidable by Plaintiff in its sole discretion.

40. No representation, inducement, promise, understanding, condition, or warranty not set forth in this Stipulation has been made to or relied upon by Defendant in agreeing to this Stipulation. Defendant hereby acknowledges that he has been duly represented by counsel in agreeing to this Stipulation.

41. In the event that one or more provisions contained in this Stipulation shall for any reason be held invalid, illegal, or unenforceable in any respect, in the sole discretion of Plaintiff, such invalidity, illegality, or unenforceability shall not affect any other provisions of this Stipulation.

42. If, for any reason, this Stipulation is voided or breached, Defendant agrees that: any statute of limitations or other time-related defenses applicable to the subject of this Stipulation and any claims arising from or related thereto are tolled from and after the date of this Stipulation. In the event this Stipulation is voided or breached, Defendant expressly agrees and acknowledges that this Stipulation shall in no way bar or otherwise preclude Plaintiff from commencing, conducting, or prosecuting any investigation, action or proceeding, however denominated, related to this Stipulation, against Defendant, or from using in any way statements, documents, or other materials produced or provided by Defendant prior to or after the date of this Stipulation.

43. If a court of competent jurisdiction determines that Defendant has breached this Stipulation, Defendant shall pay to Plaintiff the cost, if any, of such determination and of enforcing this Stipulation including, without limitation, legal fees, expenses, and court costs.

44. Plaintiff finds this relief and the agreements contained in this Stipulation appropriate and in the public interest. Accordingly, Plaintiff accepts this Stipulation in settlement of the claims asserted against Defendant in its Verified Complaint. This Stipulation shall be governed by the laws of the State of New York without regard to any conflict of laws principles.

45. Except as set forth above, the Parties hereto agree to bear their own fees, costs, and expenses of this matter.

46. Nothing contained herein shall be construed to deprive any person of any private right under the law.

47. This Stipulation may be executed in counterparts, each of which shall be deemed an original and all of which taken together shall constitute one and the same agreement. Delivery by facsimile or electronic transmission in portable document format (PDF) of an executed counterpart of this agreement is as effective as delivery of an originally executed counterpart of this Stipulation.

48. All notices, reports, requests, and other communications to any party pursuant to this Stipulation shall be in writing and shall be directed as follows:

To the Attorney General:

Emily Stern

Office of the Attorney General, Charities Bureau

28 Liberty Street, 19th Floor

New York, New York 10005

E-mail: Emily.Stern@ag.ny.gov

To Defendant Michael Michel:

c/o Michael Dantuono, Esq.

Victor A. Carr & Associates

88 Second Street

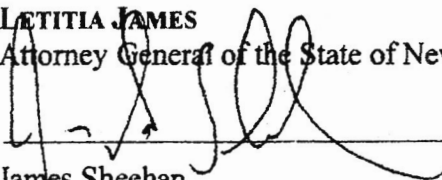
Mineola, NY 11501

E-mail: victor@victorcarrlaw.com

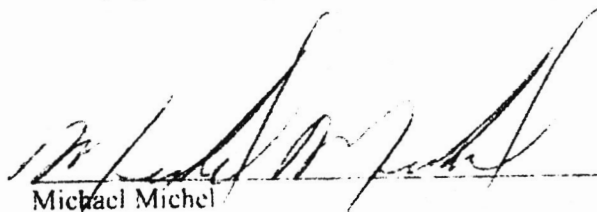
49. This Stipulation may not be amended except by an instrument in writing signed on behalf of all the Parties to this Stipulation.


IN WITNESS WHEREOF, this Stipulation is executed by the parties hereto on February 5, 2024 (the "Effective Date").

LETITIA JAMES
Attorney General of the State of New York

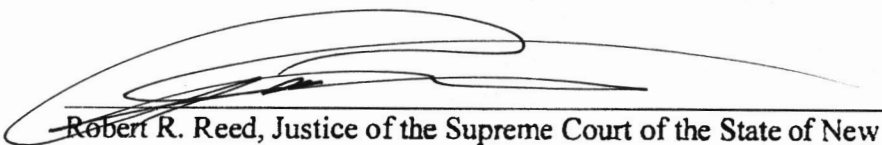
By: 

James Sheehan
Chief, Charities Bureau
28 Liberty Street
New York, New York 10005
Attorneys for Plaintiff


Michael Michel


Michael Dantuono
Victor A. Carr & Associates
88 Second Street
Mineola, NY 11501
Attorneys for Michael Michel

SO ORDERED:


Robert R. Reed, Justice of the Supreme Court of the State of New York

2/6/24

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, by
LETITIA JAMES, Attorney General of the State of New York,

Plaintiff,

-against-

DANIEL C. AUSTIN, SR., DANIEL C. AUSTIN, JR., DONALD M.
PFAIL, JOSEPH LODATO, MICHAEL W. MICHEL, ANTHONY R.
MORDENTE, AND VERA PRINCIOTTA,

Defendants.

Index No. 451533/2019

**STIPULATION OF
SETTLEMENT AND
ORDER OF DISMISSAL**

This Stipulation of Settlement (“Stipulation”) is made and entered into as of the 13th day of October, 2020, by and among Defendant Vera Princiotta (“Defendant”) and the People of the State of New York, by Attorney General Letitia James (“Plaintiff” and, together with Defendant, the “Parties”):

WHEREAS there is pending in the Supreme Court of the State of New York a Verified Complaint filed on September 3, 2019, in which Plaintiff asserts claims against Defendant pursuant to the Not-For Profit Corporation Law (“N-PCL”) and the Estates, Powers, and Trusts Law (“EPTL”) (the “Action”);

WHEREAS Defendant has appeared in the Action, has served an Answer to the Verified Complaint, has asserted a number of defenses to Plaintiff’s claims, and asserts cross-claims against individual co-defendants;

WHEREAS Defendant, through her counsel, and Plaintiff, through its counsel, have engaged in good faith, arms-length negotiations that led to this Stipulation, which embodies all of the terms and conditions of the settlement among the Parties;

WHEREAS Defendant has agreed to enter into this Stipulation to avoid further expense, inconvenience, and the distraction of burdensome litigation, and to thereby put to rest with finality this controversy with Plaintiff;

WHEREAS the Parties believe this Stipulation will advance the ability of Lutheran All Faiths Cemetery (the "Cemetery") to fulfill its mission and be in the best interest of the Cemetery's beneficiaries;

WHEREAS the Parties have had a full opportunity to examine the facts and circumstances surrounding their respective decisions to accept the terms of this Stipulation and have not relied on any representations (or the lack thereof) made by any other party concerning the circumstances leading to this Stipulation;

NOW, THEREFORE, it is agreed by and among the Parties, in consideration of the mutual covenants contained in this Stipulation, the adequacy of which are hereby acknowledged, that all claims of the Plaintiff against the Defendant be settled, compromised and dismissed on the merits and with prejudice, and without costs as to Plaintiff or Defendant, on the following terms and conditions, which the Parties respectfully request be so-ordered by the Court:

Undisputed Facts

Background

1. The New York State Division of Cemeteries discovered financial irregularities during the course of a routine assets audit of the Cemetery in 2014. The Division of Cemeteries referred its preliminary audit findings to Plaintiff, which commenced an investigation through the Charities Bureau of the Office of the Attorney General and pursuant to the New York Not-for-Profit Corporation Law and the New York Estates, Powers and Trusts Law (the "Investigation"). Based on the findings of the Investigation, Plaintiff commenced the Action against certain current and former officers and directors of the Cemetery, including Defendant, for failing to properly administer the charitable assets entrusted to their care. In the course of the Investigation, Defendant received and complied with subpoenas from the Plaintiff for documents and testimony relevant to the Investigation.

2. Defendant served as a paid member of the Cemetery Board of Directors for approximately 17 years, from 2002 until her resignation from the Board in 2019. During her tenure, she served as Vice President of the Board and as a member of multiple leadership committees convened by the Board, including its Executive, Executive Compensation, and Audit Committees.

The 2014 Award

3. In May 2014, Daniel Austin, Sr. formally resigned his positions as President and CEO of the Cemetery. On his announced resignation, Austin, Sr. was paid nearly \$900,000. The Cemetery's Financial Statement for 2014 characterized the payment as the liquidation of a retirement trust created for Austin, Sr.'s benefit even though the terms of that trust agreement provided only an annual retirement pension payable in monthly installments. After receipt of the proceeds of the retirement trust, Austin, Sr. continued to serve as Chairman of the Board and oversee executive administration of the Cemetery, for which he received compensation until he was terminated as Chairman in March 2019.

4. Upon learning of Austin, Sr.'s decision in 2014 to resign as President and CEO, Defendant took no steps – either independently or together with the other directors – to evaluate whether the terms of Austin, Sr.'s trust permitted a lump award or required Austin to terminate his paid employment by the Cemetery prior to receiving payment from the trust.

5. The first disclosure to the full Board regarding Austin, Sr.'s 2014 award appears in the minutes to the June 2014 Board meeting convened nearly five weeks after Austin, Sr. received payment. Those minutes state: "Mr. Pfail then reported that the funds held in [trust] for the benefit of Mr. Austin were fully distributed to him upon his retirement as President and Chief Executive Officer of the Cemetery. Mr. Pfail also reported that payroll taxes were lawfully deducted prior to distribution and that Mr. Austin will be required to pay income taxes on these funds." The June 2014 minutes do not record any Board consideration or ratification of the payment. Defendant did not take any steps to approve, ratify, endorse or oppose the May 2014 payment to Austin, Sr. at the

June 2014 Meeting. There is also no evidence that Defendant approved, ratified, endorsed or opposed the May 2014 payment to Austin, Sr. at any other time.

6. It was not until after Plaintiff commenced the Investigation that the Board of Directors of the Cemetery took steps to consider the propriety of the lump sum retirement payout to Austin Sr. In August 2018, the Board of Directors of the Cemetery retained D’Arcangelo & Co. LLP (“D’Arcangelo”) to conduct an independent forensic audit that examined, among other things, the terms of Austin, Sr.’s trust and the circumstances of its liquidation in 2014. D’Arcangelo presented a preliminary report of its findings to the Board in September 2018 and delivered its final report to the Board in February 2019. D’Arcangelo found no evidence in the Cemetery’s records that Austin, Sr. was entitled to a lump payment of the annuity contemplated by the terms of his trust.

7. In addition to the 2014 lump-sum payment that Austin Sr. received in exchange for his purported retirement, Austin Sr. continued to serve in a full-time, paid executive role at the Cemetery after receiving his retirement award. He insisted on being treated as an “employee,” thereby entitling him to additional benefits. The Cemetery’s Board meeting minutes, created and maintained as contemporaneous business records following review and adoption by the full Board, establish that at a Board meeting more than one year later on June 3, 2015, Austin, Sr. “vehemently disagreed” with being characterized as a “consultant” for the Cemetery: he reported during the meeting that he had “recently bec[ome] aware that his position at the Cemetery was changed from ‘employee’ to ‘consultant’ without his knowledge,” and he argued that this re-designation “violated his employment contract with the Cemetery and [was] a breach of that contract inasmuch as the employment contract expressly provide[d] that [he] shall continue to serve the Cemetery upon retirement in the capacity of Chairman of the Board at a base salary with portfolio.” Defendant took no steps to assess the propriety of engaging Austin Sr. as an “employee” after his purported retirement, nor did Defendant identify or review the employment agreement that Austin, Sr. described in the June 2015 meeting. Defendant, along with the rest of the Board, responded by

voting at the meeting “that Mr. Austin be immediately re-instated as an employee of the Cemetery if he requested.”

8. In or about December 2016, Defendant, along with the rest of the Board, voted to award Austin, Sr. a salary raise even though Austin, Sr. had purportedly retired as a Cemetery employee more than two years earlier.

9. Between May 2014 and March 2019, after Austin, Sr. had purportedly retired in order to collect a lump sum pre-payment of substantial retirement benefits, the Cemetery continued to pay Austin, Sr. an annual salary and long-term employee care and life insurance premiums. During the same period, the Cemetery also provided Austin, Sr. with a car for his exclusive use and paid Austin, Sr. a monthly pension benefit under its defined benefit employee retirement plan. At no point during this period did Defendant or her fellow directors question, review, or object to the compensation and benefits being paid to Austin, Sr. from the Cemetery’s charitable assets.

Insufficient Board Oversight and Lack of Internal Controls

10. Austin, Sr. obtained his unlawful retirement payment in 2014 through a failure of internal controls and Board oversight at the Cemetery. This was not an isolated incident: the control and oversight deficiencies continued for several more years. During the period from 2014 to 2018, the members of the Board, including Defendant, received multiple, express reminders from both the Cemetery’s auditor and investment advisor about their fiduciary obligations to operate (i) in good faith, (ii) in a manner that they reasonably believed to be in the best interest of the corporation, and (iii) with such care, including reasonable inquiry, as an ordinarily prudent person would use in similar circumstances. Despite these warnings, the details of the Cemetery’s financial performance and condition between 2014 and 2018 did not receive meaningful Board review. As a general practice during this period, President Daniel Austin, Jr., who succeeded his father, provided the Cemetery directors with limited financial information about the Cemetery. Defendant asserted no objection and did not ever request additional information or material beyond what was provided for discussion at the Board’s quarterly meetings. Defendant admitted that she

took no independent steps to understand the Cemetery's finances and had little to no familiarity with the basic elements of the Cemetery's balance sheet, despite having served on the Board for approximately 12 years in 2014 and continuing in her role as the Board's Vice President and a member of its Executive Committee for nearly five more years prior to her resignation.

11. Defendant and her fellow members of the Cemetery Board conducted no supervision, formal or informal, of the work performed by the Cemetery's executive team and regularly approved executive salary raises without any recorded basis for the increases and in spite of mounting cost pressures on the Cemetery's lawfully available operating funds. These findings were corroborated in February 2019 by the D'Arcangelo forensic review. D'Arcangelo's report noted that:

- “[F]ormal compensation agreements do not exist for those in senior level management positions;”
- Authorization for particular compensation awards is only sporadically recorded, if at all, in Board meeting minutes; and
- “There does not appear to be a consistent program in place to determine executive and management compensation as it relates specifically to retention bonuses, retirement and deferred compensation plans, general performance bonuses, fringe benefits, severance, etc., whereby the aforementioned items are clearly stated, approved and monitored.”

12. Defendant permitted Austin, Sr. and Austin, Jr. to continue unchallenged throughout her tenure as a director, despite extraordinary misconduct that included:

- Austin, Jr.'s decision to secretly hire Treasurer Donald Pfail as a Cemetery employee in 2014;
- Austin, Jr.'s diversion of nearly \$63,000 from Cemetery operating funds beginning in 2014;
- Austin, Sr.'s proposal in March 2018 that Board meeting records be deliberately edited to conceal discussion of Austin, Jr.'s theft and continued employment over Board objections;
- a June 2018 attempt by both Austins to initiate merger talks on the Cemetery's behalf without the Board's knowledge or consent; and
- a July 2018 physical altercation between Austin, Jr. and his fellow Board members during a Board meeting at which Austin, Jr. was in possession of a

firearm.

13. Defendant also took no steps to ensure compliance with the Cemetery's conflict of interest policy, which expressly prohibited several significant transactions undertaken between 2014 and 2018. The policy, adopted in 2014 as required by N-PCL Section 715-a and endorsed annually by Defendant, requires Cemetery officers to observe "high standards of business and personal ethics in the conduct of their duties and responsibilities" and expressly identifies "acts that mix the personal or financial interests of an Interested Person with the interests of the Corporation" as indicative of a prohibited conflict of interest. The policy provides a detailed procedure for reviewing and documenting potential conflicts, and it requires periodic reviews to "ensure the [Cemetery] operates in a manner consistent with charitable purposes and does not engage in activities that could be construed as a violation of Section 715 of the [N-PCL]." The policy separately instructs that periodic reviews must expressly consider "[w]hether compensation arrangements and benefits are reasonable, based on competent survey information, and [the] result of arm's length bargaining."

14. No periodic review of compensation, benefits, or potential conflicts occurred at the Cemetery between 2014 and 2018. Neither Defendant nor the other members of the Board identified or considered conflicts of interest present in various transactions as required by the Cemetery's policy during that period.

15. In August 2018, Defendant and her fellow directors failed to place the Cemetery's interests ahead of other officers and directors when they permitted Chairman Daniel Austin, Sr. to personally repay funds stolen by Austin, Jr. without any confirmation of the amounts taken, admission of wrongdoing, or subsequent review of Austin, Sr.'s continued role as Chairman. Defendant and her fellow directors took no steps subsequent to Austin, Sr.'s assurance to secure the Cemetery's assets or to restrict Austin, Jr.'s access to Cemetery financial records.

Investment in Personal Mortgage Loans to the Relatives of Cemetery Directors

16. The Cemetery's restricted trust assets are subject to the prudent institutional fund

investment standards in N-PCL Article 5-A. Defendant, as a director and Vice President for the Cemetery, was responsible for ensuring compliance with these investment standards and failed to do so.

17. The Cemetery's by-laws authorize the Board to invest in "such property, real, personal, or otherwise, including stocks, bonds or other securities, as the Board . . . may deem desirable." Between 2014 and 2018, the Cemetery's officers and directors maintained a long-standing practice of using restricted Cemetery assets to provide private mortgage loans to individual borrowers without any Board review of the collateral obtained, the loan terms offered, or the relative value of investment in mortgages versus traditional securities.

18. Between 2014 and 2019, Defendant and her fellow directors reviewed and approved Cemetery loans issued using restricted Cemetery assets. During this same period, the Board was on notice of its obligation to manage the Cemetery's mortgage lending responsibly. Despite being informed of their obligation to manage and invest the Cemetery's restricted charitable assets prudently, Defendant and the other members of the Board did not maintain any fixed standards by which they would solicit, select, and approve a new prospective borrower and investment loan.

19. Additionally, in March 2016, the Cemetery's investment advisor Wells Fargo warned that the Cemetery's private mortgage lending had generated "discretionary income" but that "the Board members must be sure to exercise their fiduciary responsibility to justify investment strategy as well as the cost of the investments." Neither Defendant as Vice President nor any other Board member took steps to review or consider the Cemetery's lending practices in response to Wells Fargo's 2016 instruction.

20. Defendant and the other members of the Cemetery's Board also authorized lending restricted Cemetery assets directly to related parties in violation of N-PCL § 715. In July 2015, the Cemetery closed an interest-only loan of \$400,000 to the daughters of director Michael Michel. The loan was to be used for the development of a residential property in Queens and was formally

agreed to by director Anthony Mordente, acting as attorney on behalf of the Cemetery, in a March 2015 loan commitment letter addressed to JLM LLC (Michel's daughters were Janine and Laura Michel). At the time Mordente executed the commitment letter, the property to be developed still belonged to Mr. Michel. There is no evidence that the Board considered this loan until June 2015, three months after his commitment letter, when Mordente first reported it to the Board as an already-agreed loan to two unidentified "borrowers who intend to build a house in Far Rockaway." Minutes from the June 2015 Board meeting do not record Board consideration of or inquiry into the loan terms or the borrowers' relationship to a sitting board member and they do not include a vote to approve the loan. Upon learning of the 2015 loan, Defendant and the other members of the Board took no steps to examine whether the loan was appropriate and in the best interests of the Cemetery.

21. In July 2017, the Cemetery loaned \$500,000 to director Joseph Lodato's brother, at Mr. Lodato's request. There is no record in the meeting minutes for June or September 2017 of the members of the Board considering the loan terms, addressing the identity of the borrower and resulting conflict of interest, or voting to approve the loan. Defendant and the other members of the Board took no steps to examine whether the July 2017 loan was appropriate and in the best interests of the Cemetery.

22. The Cemetery's 2015 and 2017 loans to the family relatives of two sitting directors together withdrew nearly \$1 million from the Cemetery's restricted trust assets for the personal use and benefit of related parties. The Cemetery files for these loans do not include any record of the individual members of the Board, including Defendant, considering investment alternatives or assessing the reasonableness of particular loan terms to the Cemetery as required by N-PCL § 715. The loans violated the plain terms of the Cemetery Conflict of Interest policy.

Professional Fees Paid to Sitting Directors

23. During the more than three decades that Defendant served as a member of the Cemetery Board, no one at the Cemetery ever requested information or documentation to support

the amounts billed to the Cemetery for Defendant Anthony Mordente's legal work and no one disputed the total amounts billed. Defendant took no steps in her capacity as a Board member to ensure an objective determination by disinterested officers or directors that the amounts paid to Mordente for legal work on behalf of the Cemetery were fair, reasonable, and in the Cemetery's best interests.

24. Between 2013 and 2018, the Cemetery paid Mordente more than \$272,000 in professional fees at the same time that he was paid \$74,000 in director fees. Beginning in 2014, Mordente also received an annual salary of \$100,000 for his position as Cemetery CEO. Mordente received a salary raise two years later in December 2016. These payments, executed without any substantive Board review, violated the terms of N-PCL Section 715 and the Cemetery's Conflict of Interest Policy.

25. Cemetery records indicate that during this same period time, Mordente also earned separate fees as Lender Legal Counsel at the Cemetery's mortgage loan closings. Those fees were deducted from the total loan proceeds paid to each borrower from restricted Cemetery assets at closing. Defendant never reviewed Mordente's role in these transactions or his associated fee during her tenure as a member of the Board.

Waste of Cemetery Assets

26. By 2013, the Cemetery's outside auditor had identified operating costs as a concern and made explicit recommendations to the Board that the Cemetery take steps to reduce administrative spending. Despite those warnings, from 2013 to 2018, the Cemetery's operating expenses consistently increased without intervention by Defendant or other members of the Board.

27. In 2016, executive salaries, professional fees, director fees and office expenses for the Cemetery totaled approximately \$660,000 and consumed almost half (45%) of the total revenue from grave and niche sales for the year. In 2017, the same expenses totaled \$729,320 and represented 54% of the total revenue from grave and niche sales for the year. Defendant took

no steps to review the reasonableness of the Cemetery payroll or office expenses during her tenure as a Director and Vice President.

Invasion of the Perpetual Care Fund

28. The officers and directors of the Cemetery authorized regular incursions into the principal of its Perpetual Care Fund in recent years to support their overspending. This practice is expressly prohibited by the plain language of N-PCL Article 15.

29. N-PCL Section 1507(c) requires a cemetery corporation to keep, “separate and apart from its other funds, all moneys and property received . . . for the perpetual care of any lot,” and it instructs in plain language that the contents of the Perpetual Care Fund represent assets held in trust, so that the income from those funds shall be used “solely for the perpetual care and maintenance of the lots” while the principal remains inviolate.

30. The Cemetery recites these restrictions annually in Note 1 to its Financial Statements. Note 1’s description of the Fund accounting used to segregate Cemetery assets states that: “The perpetual care fund consists of funds endowed to The Lutheran Cemetery for the annual care of graves. The principal of this fund is permanently restricted and only the income therefrom is applied against yearly maintenance charges.”

31. Despite their acknowledgment that Perpetual Care Fund assets exist solely for the benefit of individual subscription lots and may not be used for general administrative expenses, Defendant and all of the other officers and directors of the Cemetery routinely violated this prohibition between 2014 and 2018 by approving withdrawals from the Cemetery’s Perpetual Care trust accounts to fund, among other things, director meeting fees, scheduled deposits into the Cemetery’s general operating account, vendor bill payments, and union pension contributions. Defendant took no steps to identify and eliminate this spending despite her knowledge of the restrictions that govern Perpetual Care Fund use and her long tenure as a senior member of the Cemetery’s Board

32. The members of the Board, including Defendant, were informed of their obligation to refrain from spending Perpetual Care assets on ordinary administrative operating expenses and ignored multiple explicit warnings from the Cemetery's outside auditor. In March 2012, then-Treasurer Donald Pfail reported to the other members of the Board, including Defendant, that the Cemetery's General Fund — the unrestricted fund available to pay ordinary operating costs including salary, vendor expenses, utility costs, and machine repair — owed \$600,000 to the Perpetual Care Fund. In June 2013, Austin, Sr. reported a recommendation by auditor Andrew Muhlstock that the Board focus on growing its Perpetual Care Fund.

33. In March 2015, Mr. Muhlstock reported directly to the members of the Board, including Defendant, that the Cemetery "must decrease the amount of money withdrawn from the perpetual care fund to cover operating expenses." Mr. Muhlstock's warning is recorded in contemporaneous minutes created for the March 2015 meeting that were reviewed and adopted by the members of the Board.

34. In March 2017, Mr. Muhlstock reported to the members of the Board, including Defendant, that the Cemetery's General (Operating) Fund "owe[d] the Perpetual Care Fund the approximate sum of One Million (\$1,000,000.00) Dollars." Mr. Muhlstock's warning is recorded in contemporaneous minutes created for the March 2017 meeting that were reviewed and adopted by the members of the Board.

35. In March 2018, Mr. Muhlstock "cautioned the Cemetery that it is drawing funds from the Perpetual Care Fund in an amount greater than it is permitted to take." Mr. Muhlstock's warning is recorded in contemporaneous meeting minutes created for the March 2018 Board meeting that were reviewed and adopted by the members of the Board.

36. The Cemetery Financial Statements for each of the years from 2014 to 2017 confirm the continued drain from the Perpetual Care Fund: the annual audited statement of Cemetery Assets recorded inter-fund receivable amounts owed to the Perpetual Care Fund of \$962,660 (2013), \$1.3 million (2014), \$977,363 (2015), \$1.19 million (2016) and \$960,021 (2017)

for the years 2013 to 2017, respectively. The members of the Board, including Defendant, were responsible for reviewing and approving each of these Financial Statements.

Stipulated Legal Conclusions

37. Defendant, in her capacity as an officer and director of the Cemetery, owed the Cemetery fiduciary duties of care, loyalty, and obedience. In addition, Defendant was a trustee pursuant to EPTL Section 8-1.4 because she administered property for charitable purposes in the State of New York.

38. Defendant admits that she violated her fiduciary duties to the Cemetery as a member of the Board of Directors when she failed to prevent an unlawful distribution of approximately \$900,000 to Daniel Austin, Sr. in May 2014.

39. Defendant further admits that she violated her fiduciary duties to the Cemetery as a member of the Board of Directors during the five years following Austin, Sr.'s resignation as President and CEO by failing to exercise even cursory oversight of the Cemetery's finances and by approving multiple transactions that violated the plain terms of the N-PCL and the Cemetery's own Conflict of Interest Policy.

40. Defendant further admits that she violated her fiduciary duties to the Cemetery as a member of the Board of Directors when she caused and/or permitted unlawful withdrawal of principal and income amounts from the Cemetery's Perpetual Care fund through a pattern and practice of transferring monies from the fund for use in meeting ordinary operating costs unrelated to the care of Cemetery lots associated with a perpetual care subscription.

41. Defendant further admits that the violations referred to in this section violated Sections 715, 717, and 1507 of the N-PCL and Section 8-1.4 of the EPTL and that, as a result of such violations, the Cemetery has been damaged.

Stipulated Relief

42. Defendant agrees that she will cooperate with the Attorney General fully and completely in the prosecution of the Action by the Attorney General against any other persons or entities connected with the Cemetery. Such cooperation shall include, among other things, voluntarily producing documents, meeting with the Attorney General to prepare via remote or electronic means for testimony, providing truthful testimony via remote or electronic means or via commission, including in pretrial depositions and at trial as permitted by the Court, and submitting truthful affidavits as requested by the Attorney General in connection with litigation concerning the Cemetery or any persons or entities connected to the Cemetery.

43. Pursuant to EPTL § 8-1.4(m) and N-PCL § 714, Defendant hereby accepts a permanent bar from service as an officer, director or trustee or in any position where she has any fiduciary responsibilities for any not-for-profit or charitable organization incorporated, registered, operating or soliciting contributions in New York, or for any other individual or entity that holds charitable assets or solicit charitable contributions in the State of New York, including, but not limited to, responsibility for financial and/or management oversight of any New York charitable entity.

44. Defendant hereby agrees to pay restitution to the Cemetery in the amount of \$50,000 in director's fees earned during the period 2014 to 2019. Defendant further agrees that full payment of this restitution amount will be completed upon execution of this Stipulation. Plaintiff shall deliver this restitution payment to the Cemetery as full compensation to the Cemetery for monetary losses and damages incurred as a result of the breaches of fiduciary duty outlined in paragraphs 38 to 41 above.

45. Dismissal of lawsuit with prejudice. In consideration of the covenants undertaken herein, Plaintiff will discontinue the Action with prejudice against Defendant.

46. Resolution of all claims. This Stipulation resolves all outstanding claims by Plaintiff against Defendant. Plaintiff hereby agrees that it will seek no additional recovery or

restitution of any kind from Defendant in connection with the Action, including but not limited to contribution under N-PCL Sections 719(c) and (d) for amounts recoverable from the remaining defendants in the Action subsequent to the execution of this Stipulation. Nothing in this Stipulation shall affect or limit Plaintiff's continuing claims against other defendants in the Action. Dismissal of Plaintiff's claims against Defendant shall have no effect on Plaintiff's continuing claims against, and in no way shall serve as a release of, the other defendants in this action.

Additional Terms and Conditions

47. Defendant shall not take any action or make any statement denying, directly or indirectly, the propriety of this Stipulation or expressing any view that the Action is without a factual basis.

48. Plaintiff has agreed to the terms of this Stipulation based on, among other things, the representations made to Plaintiff by the Defendant and her undersigned counsel and the Attorney General's own factual investigation as set forth above. To the extent that any material representation made by the Defendant, directly or through her counsel, during the course of the Attorney General's Investigation and the Action, is later found to be inaccurate or misleading, this Stipulation is voidable by Plaintiff in its sole discretion.

49. No representation, inducement, promise, understanding, condition, or warranty not set forth in this Stipulation has been made to or relied upon by Defendant in agreeing to this Stipulation. Defendant hereby acknowledges that she has been duly represented by counsel in agreeing to this Stipulation.

50. In the event that one or more provisions contained in this Stipulation shall for any reason be held invalid, illegal, or unenforceable in any respect, in the sole discretion of Plaintiff, such invalidity, illegality, or unenforceability shall not affect any other provisions of this Stipulation.

51. If, for any reason, this Stipulation is voided or breached, Defendant agrees that: any statute of limitations or other time-related defenses applicable to the subject of this Stipulation

and any claims arising from or related thereto are tolled from and after the date of this Stipulation. In the event this Stipulation is voided or breached, Defendant expressly agrees and acknowledges that this Stipulation shall in no way bar or otherwise preclude Plaintiff from commencing, conducting, or prosecuting any investigation, action or proceeding, however denominated, related to this Stipulation, against Defendant, or from using in any way statements, documents, or other materials produced or provided by Defendant prior to or after the date of this Stipulation.

52. If a court of competent jurisdiction determines that Defendant has breached this Stipulation, Defendant shall pay to Plaintiff the cost, if any, of such determination and of enforcing this Stipulation including, without limitation, legal fees, expenses, and court costs.

53. Plaintiff finds this relief and the agreements contained in this Stipulation appropriate and in the public interest. Accordingly, Plaintiff accepts this Stipulation in settlement of the claims asserted against Defendant in its Verified Complaint. This Stipulation shall be governed by the laws of the State of New York without regard to any conflict of laws principles.

54. Except as set forth above, the Parties hereto agree to bear their own fees, costs and expenses of this matter.

55. Nothing contained herein shall be construed to deprive any person of any private right under the law.

56. This Stipulation may be executed in counterparts, each of which shall be deemed an original and all of which taken together shall constitute one and the same agreement. Delivery by facsimile or electronic transmission in portable document format (PDF) of an executed counterpart of this agreement is as effective as delivery of an originally executed counterpart of this Stipulation.

57. All notices, reports, requests, and other communications to any party pursuant to this Stipulation shall be in writing and shall be directed as follows:

To the Attorney General:

Kate Suvari

Office of the Attorney General, Charities Bureau

28 Liberty Street, 19th Floor

New York, New York 10005

E-mail: Catherine.Suvari@ag.ny.gov

cc: Emily.Stern@ag.ny.gov

To Defendant Vera Princiotta:

c/o Michael H. Maizes, Esq.

MAIZES & MAIZES LLP

2027 Williamsbridge Road - 2nd Floor

Bronx, New York 10461

E-mail: maizeslaw@aol.com

58. This Stipulation may not be amended except by an instrument in writing signed on behalf of all the Parties to this Stipulation.

IN WITNESS WHEREOF, this Stipulation is executed by the parties hereto on October 13, 2020 (the "Effective Date").

LETITIA JAMES
Attorney General of the State of New York

By: _____

James Sheehan
Chief, Charities Bureau
28 Liberty Street
New York, New York 10005
Attorneys for Plaintiff

Vera Princiotta

Vera Princiotta

Michael H. Maizes

Michael H. Maizes, Esq.
MAIZES & MAIZES LLP
2027 Williamsbridge Road - 2nd Floor
Bronx, New York 10461
Attorneys for Vera Princiotta

SO ORDERED:

O. Peter Sherwood, Justice of the Supreme Court of the State of New York

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, by
LETITIA JAMES, Attorney General of the State of New York,

Plaintiff,

-against-

DANIEL C. AUSTIN, SR., DANIEL C. AUSTIN, JR., DONALD M.
PFAIL, JOSEPH LODATO, MICHAEL W. MICHEL, ANTHONY R.
MORDENTE, AND VERA PRINCIOTTA,

Defendants.

Index No. 451533/2019

**STIPULATION OF
SETTLEMENT AND
ORDER OF DISMISSAL**

This Stipulation of Settlement (“Stipulation”) is made and entered into as of the second day of October, 2020, by and among Eileen Pfail, solely in her capacity as Guardian *Ad Litem* for Defendant Donald M. Pfail (“Defendant”), and the People of the State of New York, by Attorney General Letitia James (“Plaintiff” and, together with Defendant, the “Parties”):

WHEREAS there is pending in the Supreme Court of the State of New York a Verified Complaint filed on September 3, 2019, in which Plaintiff asserts claims against Defendant pursuant to the Not-For Profit Corporation Law (“N-PCL”) and the Estates, Powers, and Trusts Law (“EPTL”) (the “Action”) in connection with his former role as an officer and director for the Lutheran All Faiths Cemetery (the “Cemetery”);

WHEREAS Defendant served on the Board of the Cemetery for more than 38 years and as its Treasurer from approximately 2002 to August 2016 and also provided paid professional accounting services to the Cemetery throughout his tenure on the Board in his capacity as a Certified Public Accountant;

WHEREAS Defendant was fired from his positions with the Cemetery in August 2016 and later asserted and settled a related wrongful termination claim against the Cemetery in December 2017;

WHEREAS the Court has Ordered appointment of Defendant's spouse, Eileen Pfail, as the Guardian *Ad Litem* for Defendant in the Action (Defendant's "Guardian" or the "Guardian") following its review of sworn affidavit testimony from neurologist Jeffrey E. Mallin, M.D. that Defendant has experienced a marked decline in cognitive and executive function in recent years and requires the support of a guardian *ad litem* to defend and protect his rights in this action;

WHEREAS Defendant has not served an Answer to the Verified Complaint and the Parties have agreed to extend his time to answer through October 30, 2020;

WHEREAS Defendant's incapacity, as recognized by the Court's appointment of the Guardian pursuant to CPLR § 1201 and CPLR Rule 1202 by Order dated February 24, 2020 (NYSCEF Document No. 104), prevents him from attesting to, admitting, or denying facts and breaches of legal duty alleged in the Verified Complaint;

WHEREAS Defendant, through his Guardian and her counsel, and Plaintiff, through its counsel, have engaged in good faith, arms-length negotiations that led to this Stipulation, which embodies all of the terms and conditions of the settlement among the Parties;

WHEREAS Defendant has agreed through his Guardian to enter into this Stipulation to avoid further expense, inconvenience, and the distraction of burdensome litigation, and to thereby put to rest with finality this controversy with Plaintiff;

WHEREAS Plaintiff believes this Stipulation will advance the ability of Lutheran All Faiths Cemetery (the "Cemetery") to fulfill its mission and be in the best interest of the Cemetery's beneficiaries;

WHEREAS the Parties have had a full opportunity to examine the facts and circumstances surrounding their respective decisions to accept the terms of this Stipulation and have not relied on any representations (or the lack thereof) made by any other party concerning the circumstances leading to this Stipulation;

NOW, THEREFORE, it is agreed by and among the Parties, in consideration of the mutual covenants contained in this Stipulation, the adequacy of which are hereby acknowledged, that all claims of the Plaintiff against the Defendant be settled, compromised and dismissed on the merits and with prejudice, and without costs as to Plaintiff or Defendant, on the following terms and conditions, which the Parties respectfully request be so-ordered by the Court:

Stipulated Relief

1. Defendant agrees that he can neither admit nor contest the individual findings of fact alleged in Plaintiff's Verified Complaint as a result of his incapacity.

2. Defendant agrees that, to the extent he is reasonably able due to his incapacity, he will cooperate with the Attorney General fully and completely in the prosecution of the Action by the Attorney General against any other persons or entities connected with the Cemetery. Such cooperation shall include, among other things, voluntarily producing documents, meeting with the Attorney General to prepare for testimony, providing truthful testimony, including in pretrial depositions and at trial, and submitting truthful affidavits as requested by the Attorney General in connection with litigation concerning the Cemetery or any persons or entities connected to the Cemetery.

3. Pursuant to EPTL § 8-1.4(m) and N-PCL § 714, Defendant hereby accepts a permanent bar from service as an officer, director or trustee or in any position where he has any fiduciary responsibilities for any not-for-profit or charitable organization incorporated, registered, operating or soliciting contributions in New York, or for any other individual or entity that holds charitable assets or solicit charitable contributions in the State of New York, including, but not limited to, responsibility for financial and/or management oversight of any New York charitable entity.

4. Defendant hereby agrees to pay restitution to the Cemetery in the amount of \$50,000 in director's fees and professional fees earned during the period 2014 to 2016. Defendant further agrees that full payment of this restitution amount will be completed within sixty (60) days

of the Effective Date of this Stipulation. Plaintiff shall deliver this restitution payment to the Cemetery as full compensation to the Cemetery for the alleged monetary losses and damages incurred as a result of his alleged conduct as an officer and director of the Cemetery. It is further agreed by and among the Parties that, consistent with the principles outlined in General Obligations Law § 15-108(b) and CPLR 1402, Defendant's payment of this restitution amount will be deemed by the Parties to fully satisfy his alleged liability for any and all monetary losses and damages incurred by the Cemetery as a result of Defendant's alleged conduct. It is further understood by and among the Parties that Plaintiff will not seek additional recovery from any other defendant in this action for economic losses caused by Defendant's conduct.

5. Dismissal of lawsuit with prejudice. In consideration of the covenants undertaken herein, Plaintiff will discontinue the Action with prejudice against Defendant.

6. Resolution of all claims. This Stipulation resolves all outstanding claims by Plaintiff against Defendant. Plaintiff hereby agrees that it will seek no additional recovery or restitution of any kind from Defendant in connection with the Action, including but not limited to contribution under N-PCL Sections 719(c) and (d) for amounts recoverable from the remaining defendants in the Action subsequent to the execution of this Stipulation. Nothing in this Stipulation shall affect or limit Plaintiff's continuing claims against other defendants in the Action. Dismissal of Plaintiff's claims against Defendant shall have no effect on Plaintiff's continuing claims against, and in no way shall serve as a release of, the other defendants in this action.

Additional Terms and Conditions

7. Neither Defendant nor his Guardian shall take any action or make any statement denying, directly or indirectly, the propriety of Plaintiff's Verified Complaint or this Stipulation or expressing any view that the Action is without a factual basis.

8. Plaintiff has agreed to the terms of this Stipulation based on, among other things, its own factual investigation as set forth in the Verified Complaint. To the extent that any material representation made by the Defendant, directly or through his counsel, during the course of the

Attorney General's investigation is later found to be inaccurate or misleading, this Stipulation is voidable by Plaintiff in its sole discretion. No inducement, promise, understanding, condition, or warranty not set forth in this Stipulation has been made to or relied upon by Plaintiff in agreeing to this Stipulation.

9. No representation, inducement, promise, understanding, condition, or warranty not set forth in this Stipulation has been made to or relied upon by Defendant in agreeing to this Stipulation. Defendant's Guardian hereby acknowledges that she has been duly represented by her counsel in agreeing to this Stipulation on Defendant's behalf.

10. In the event that one or more provisions contained in this Stipulation shall for any reason be held invalid, illegal, or unenforceable in any respect, in the sole discretion of Plaintiff, such invalidity, illegality, or unenforceability shall not affect any other provisions of this Stipulation.

11. If, for any reason, this Stipulation is voided or breached, Defendant agrees that: any statute of limitations or other time-related defenses applicable to the subject of this Stipulation and any claims arising from or related thereto are tolled from and after the date of this Stipulation. In the event this Stipulation is voided or breached, Defendant expressly agrees and acknowledges that this Stipulation shall in no way bar or otherwise preclude Plaintiff from commencing, conducting, or prosecuting any investigation, action or proceeding, however denominated, related to this Stipulation, against Defendant, or from using in any way statements, documents, or other materials produced or provided by Defendant prior to or after the date of this Stipulation.

12. If a court of competent jurisdiction determines that Defendant has breached this Stipulation, Defendant shall pay to Plaintiff the cost, if any, of such determination and of enforcing this Stipulation including, without limitation, legal fees, expenses, and court costs.

13. Plaintiff finds this relief and the agreements contained in this Stipulation appropriate and in the public interest. Accordingly, Plaintiff accepts this Stipulation in settlement

of the claims asserted against Defendant in its Verified Complaint. This Stipulation shall be governed by the laws of the State of New York without regard to any conflict of laws principles.

14. Except as set forth above, the Parties hereto agree to bear their own fees, costs and expenses of this matter.

15. Nothing contained herein shall be construed to deprive any person of any private right under the law.

16. This Stipulation may be executed in counterparts, each of which shall be deemed an original and all or which taken together shall constitute one and the same agreement. Delivery by facsimile or electronic transmission in portable document format (PDF) of an executed counterpart of this agreement is as effective as delivery of an originally executed counterpart of this Stipulation.

17. All notices, reports, requests, and other communications to any party pursuant to this Stipulation shall be in writing and shall be directed as follows:

To the Attorney General:

Kate Suvari
Office of the Attorney General, Charities Bureau
28 Liberty Street, 19th Floor
New York, New York 10005
E-mail: Catherine.Suvari@ag.ny.gov
cc: Emily.Stern@ag.ny.gov

To Defendant Donald Pfail and/or his Guardian *Ad Litem*, Eileen Pfail:


c/o Eric Aschkenasy, Esq.
EISEMAN LEVINE LEHRHAUPT & KAKOYLANNIS, P.C.
805 Third Avenue
New York, New York 10022
E-mail: easchkenasy@eisemanlevine.com

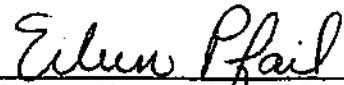
18. This Stipulation may not be amended except by an instrument in writing signed on behalf of all the Parties to this Stipulation.

IN WITNESS WHEREOF, this Stipulation is executed by the parties hereto on October 2, 2020 (the "Effective Date").

LETITIA JAMES
Attorney General of the State of New York

By: _____


James Sheehan
Chief, Charities Bureau
28 Liberty Street
New York, New York 10005
Attorneys for Plaintiff


Eileen Pfail, Guardian *Ad Litem* to
Defendant Donald M. Pfail


Eric Aschkenasy, Esq.
EISEMAN LEVINE LEHRHAUPT & KAKOYLANNIS, P.C.
805 Third Avenue
New York, New York 10022
Attorneys for Guardian Ad Litem Eileen Pfail

SO ORDERED:

O. Peter Sherwood, Justice of the Supreme Court of the State of New York

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, by
LETITIA JAMES, Attorney General of the State of New York,

Plaintiff,

-against-

DANIEL C. AUSTIN, SR., DANIEL C. AUSTIN, JR., DONALD M.
PFAIL, JOSEPH LODATO, MICHAEL W. MICHEL, ANTHONY R.
MORDENTE, AND VERA PRINCIOTTA,

Defendants.

Index No. 451533/2019

**STIPULATION OF
SETTLEMENT AND
ORDER OF DISMISSAL**

This Stipulation of Settlement (“Stipulation”) is made and entered into as of the sixth day of March, 2020, by and among Defendant Joseph Lodato (“Defendant”) and the People of the State of New York, by Attorney General Letitia James (“Plaintiff” and, together with Defendant, the “Parties”):

WHEREAS there is pending in the Supreme Court of the State of New York a Verified Complaint filed on September 3, 2019, in which Plaintiff asserts claims against Defendant pursuant to the Not-For Profit Corporation Law (“N-PCL”) and the Estates, Powers, and Trusts Law (“EPTL”) (the “Action”);

WHEREAS Defendant has appeared in the Action, has served an Answer to the Verified Complaint, and has asserted a number of defenses to Plaintiff’s claims;

WHEREAS Defendant, through his counsel, and Plaintiff, through its counsel, have engaged in good faith, arms-length negotiations that led to this Stipulation, which embodies all of the terms and conditions of the settlement among the Parties;

WHEREAS Defendant has agreed to enter into this Stipulation to avoid further expense, inconvenience, and the distraction of burdensome litigation, and to thereby put to rest with finality this controversy with Plaintiff;

WHEREAS the Parties believe this Stipulation will advance the ability of Lutheran All Faiths Cemetery (the “Cemetery”) to fulfill its mission and be in the best interest of the Cemetery’s beneficiaries;

WHEREAS the Parties have had a full opportunity to examine the facts and circumstances surrounding their respective decisions to accept the terms of this Stipulation and have not relied on any representations (or the lack thereof) made by any other party concerning the circumstances leading to this Stipulation;

NOW, THEREFORE, it is agreed by and among the Parties, in consideration of the mutual covenants contained in this Stipulation, the adequacy of which are hereby acknowledged, that all claims of the Plaintiff against the Defendant be settled, compromised and dismissed on the merits and with prejudice, and without costs as to Plaintiff or Defendant, on the following terms and conditions, which the Parties respectfully request be so-ordered by the Court:

Undisputed Facts

Background

1. The New York State Division of Cemeteries discovered financial irregularities during the course of a routine assets audit of the Cemetery in 2014. The Division of Cemeteries referred its preliminary audit findings to Plaintiff, which commenced an investigation through the Charities Bureau of the Office of the Attorney General and pursuant to the New York Not-for-Profit Corporation Law and the New York Estates, Powers and Trusts Law (the “Investigation”). Based on the findings of the Investigation, Plaintiff commenced the Action against certain current and former officers and directors of the Cemetery, including Defendant, for failing to properly administer the charitable assets entrusted to their care. In the course of the Investigation, Defendant received and complied with subpoenas from the Plaintiff for documents and testimony relevant to the Investigation.

The 2014 Award

2. In May 2014, Daniel Austin, Sr. formally resigned his positions as President and CEO of the Cemetery. On his announced resignation, Austin, Sr. was paid nearly \$900,000. The Cemetery's Financial Statement for 2014 characterized the payment as the liquidation of a retirement trust created for Austin, Sr.'s benefit even though the terms of that trust agreement provided only an annual retirement pension payable in monthly installments. After receipt of the proceeds of the retirement trust, Austin, Sr. continued to serve as Chairman of the Board and oversee executive administration of the Cemetery, for which he received compensation until he was terminated as Chairman in March 2019.

3. Upon learning of Austin, Sr.'s decision in 2014 to resign as President and CEO, Defendant took no steps – either independently or together with the other directors – to evaluate whether the terms of Austin, Sr.'s trust permitted a lump award or required Austin to terminate his paid employment by the Cemetery prior to receiving payment from the trust.

4. The first disclosure to the full Board regarding Austin, Sr.'s 2014 award appears in the minutes to the June 2014 Board meeting convened nearly five weeks after Austin, Sr. received payment. Those minutes state: "Mr. Pfail then reported that the funds held in [trust] for the benefit of Mr. Austin were fully distributed to him upon his retirement as President and Chief Executive Officer of the Cemetery. Mr. Pfail also reported that payroll taxes were lawfully deducted prior to distribution and that Mr. Austin will be required to pay income taxes on these funds." The June 2014 minutes do not record any Board consideration or ratification of the payment. Defendant did not take any steps to approve, ratify, endorse or oppose the May 2014 payment to Austin, Sr. at the June 2014 Meeting. There is also no evidence that Defendant approved, ratified, endorsed or opposed the May 2014 payment to Austin, Sr. at any other time.

5. It was not until after Plaintiff commenced the Investigation that the Board of Directors of the Cemetery took steps to consider the propriety of the lump sum retirement payout to Austin Sr. In August 2018, the Board of Directors of the Cemetery retained D'Arcangelo & Co.

LLP (“D’Arcangelo”) to conduct an independent forensic audit that examined, among other things, the terms of Austin, Sr.’s trust and the circumstances of its liquidation in 2014. D’Arcangelo presented a preliminary report of its findings to the Board in September 2018 and delivered its final report to the Board in February 2019. D’Arcangelo found no evidence in the Cemetery’s records that Austin, Sr. was entitled to a lump payment of the annuity contemplated by the terms of his trust.

6. In addition to the 2014 lump-sum payment that Austin Sr. received in exchange for his purported retirement, Austin Sr. continued to serve in a full-time, paid executive role at the Cemetery after receiving his retirement award. He insisted on being treated as an “employee,” thereby entitling him to additional benefits. The Cemetery’s Board meeting minutes, created and maintained as contemporaneous business records following review and adoption by the full Board, establish that at a Board meeting more than one year later on June 3, 2015, Austin, Sr. “vehemently disagreed” with being characterized as a “consultant” for the Cemetery: he reported during the meeting that he had “recently bec[ome] aware that his position at the Cemetery was changed from ‘employee’ to ‘consultant’ without his knowledge,” and he argued that this re-designation “violated his employment contract with the Cemetery and [was] a breach of that contract inasmuch as the employment contract expressly provide[d] that [he] shall continue to serve the Cemetery upon retirement in the capacity of Chairman of the Board at a base salary with portfolio.” Defendant took no steps to assess the propriety of engaging Austin Sr. as an “employee” after his purported retirement, nor did Defendant identify or review the employment agreement that Austin, Sr. described in the June 2015 meeting. Defendant, along with the rest of the Board, responded by voting at the meeting “that Mr. Austin be immediately re-instated as an employee of the Cemetery if he requested.”

7. In or about December 2016, Defendant, along with the rest of the Board, voted to award Austin, Sr. a salary raise even though Austin, Sr. had purportedly retired as a Cemetery employee more than two years earlier.

8. Between May 2014 and March 2019, after Austin, Sr. had purportedly retired in order to collect a lump sum pre-payment of substantial retirement benefits, the Cemetery continued to pay Austin, Sr. an annual salary and long-term employee care and life insurance premiums. During the same period, the Cemetery also provided Austin, Sr. with a car for his exclusive use and paid Austin, Sr. a monthly pension benefit under its defined benefit employee retirement plan. At no point during this period did Defendant or his fellow directors question, review, or object to the compensation and benefits being paid to Austin, Sr. from the Cemetery's charitable assets.

Insufficient Board Oversight and Lack of Internal Controls

9. Austin, Sr. obtained his unlawful retirement payment in 2014 through a failure of internal controls and Board oversight at the Cemetery. This was not an isolated incident: the control and oversight deficiencies continued for several more years. During the period from 2014 to 2018, the members of the Board, including Defendant, received multiple, express reminders from both the Cemetery's auditor and investment advisor about their fiduciary obligations to operate (i) in good faith, (ii) in a manner that they reasonably believed to be in the best interest of the corporation, and (iii) with such care, including reasonable inquiry, as an ordinarily prudent person would use in similar circumstances. Despite these warnings, the details of the Cemetery's financial performance and condition between 2014 and 2018 did not receive meaningful Board review. As a general practice during this period, President Daniel Austin, Jr., who succeeded his father, provided the Cemetery directors with limited financial information about the Cemetery. Defendant asserted no objection. Defendant admitted that he had little to no familiarity with the Cemetery's Audited Financial Statements or with the basic elements of the Cemetery's balance sheet when he served as Treasurer of the Cemetery from 2018 to 2019.

10. Defendant and his fellow members of the Cemetery Board conducted no supervision, formal or informal, of the work performed by the Cemetery's executive team and regularly approved executive salary raises without any recorded basis for the increases and in spite of mounting cost pressures on the Cemetery's lawfully available operating funds. These findings

were corroborated in February 2019 by the D’Arcangelo forensic review. D’Arcangelo’s report noted that:

- “[F]ormal compensation agreements do not exist for those in senior level management positions;”
- Authorization for particular compensation awards is only sporadically recorded, if at all, in Board meeting minutes; and
- “There does not appear to be a consistent program in place to determine executive and management compensation as it relates specifically to retention bonuses, retirement and deferred compensation plans, general performance bonuses, fringe benefits, severance, etc., whereby the aforementioned items are clearly stated, approved and monitored.”

11. Defendant permitted Austin, Sr. and Austin, Jr. to continue unchallenged throughout his tenure as a director, despite extraordinary misconduct that included:

- Austin, Jr.’s decision to secretly hire Treasurer Donald Pfail as a Cemetery employee in 2014;
- Austin, Jr.’s [undisputed] diversion of nearly \$63,000 from Cemetery operating funds beginning in 2014;
- Austin, Sr.’s proposal in March 2018 that Board meeting records be deliberately edited to conceal discussion of Austin, Jr.’s theft and continued employment over Board objections;
- a June 2018 attempt by both Austins to initiate merger talks on the Cemetery’s behalf without the Board’s knowledge or consent; and
- a July 2018 physical altercation between Austin, Jr. and his fellow Board members during a Board meeting at which Austin, Jr. was in possession of a firearm.

12. Defendant also took no steps to ensure compliance with the Cemetery’s conflict of interest policy, which expressly prohibited several significant transactions undertaken between 2014 and 2018. The policy, adopted in 2014 as required by N-PCL Section 715-a and endorsed annually by Defendant, requires Cemetery officers to observe “high standards of business and personal ethics in the conduct of their duties and responsibilities” and expressly identifies “acts that mix the personal or financial interests of an Interested Person with the interests of the Corporation” as indicative of a prohibited conflict of interest. The policy provides a detailed

procedure for reviewing and documenting potential conflicts, and it requires periodic reviews to “ensure the [Cemetery] operates in a manner consistent with charitable purposes and does not engage in activities that could be construed as a violation of Section 715 of the [N-PCL].” The policy separately instructs that periodic reviews must expressly consider “[w]hether compensation arrangements and benefits are reasonable, based on competent survey information, and [the] result of arm’s length bargaining.”

13. No periodic review of compensation, benefits, or potential conflicts occurred at the Cemetery between 2014 and 2018. Neither Defendant nor the other members of the Board identified or considered conflicts of interest present in various transactions as required by the Cemetery’s policy during that period.

14. In August 2018, Defendant and his fellow directors failed to place the Cemetery’s interests ahead of other officers and directors when they permitted Chairman Daniel Austin, Sr. to personally repay funds stolen by Austin, Jr. without any confirmation of the amounts taken, admission of wrongdoing, or subsequent review of Austin, Sr.’s continued role as Chairman. Defendant and his fellow directors took no steps subsequent to Austin, Sr.’s assurance to secure the Cemetery’s assets or to restrict Austin, Jr.’s access to Cemetery financial records.

Investment in Personal Mortgage Loans to the Relatives of Cemetery Directors

15. The Cemetery’s restricted trust assets are subject to the prudent institutional fund investment standards in N-PCL Article 5-A. Defendant, as a director of the Cemetery, was responsible for ensuring compliance with these investment standards, but he failed to do so.

16. The Cemetery’s by-laws authorize the Board to invest in “such property, real, personal, or otherwise, including stocks, bonds or other securities, as the Board . . . may deem desirable.” Between 2014 and 2018, the Cemetery’s officers and directors maintained a long-standing practice of using restricted Cemetery assets to provide private mortgage loans to individual borrowers without any Board review of the collateral obtained, the loan terms offered,

or the relative value of investment in mortgages versus traditional securities.

17. Between 2014 and 2019, Defendant and his fellow directors reviewed and approved Cemetery loans issued using restricted Cemetery assets. During this same period, the Board was on notice of its obligation to manage the Cemetery's mortgage lending responsibly. Despite being informed of their obligation to manage and invest the Cemetery's restricted charitable assets prudently, Defendant and the other members of the Board did not maintain any fixed standards by which they would solicit, select, and approve a new prospective borrower and investment loan.

18. Additionally, in March 2016, the Cemetery's investment advisor Wells Fargo warned that the Cemetery's private mortgage lending had generated "discretionary income" but that "the Board members must be sure to exercise their fiduciary responsibility to justify investment strategy as well as the cost of the investments." Neither Defendant nor any other Board member took steps to review or consider the Cemetery's lending practices in response to Wells Fargo's 2016 instruction.

19. Defendant and the other members of the Cemetery's Board also authorized lending restricted Cemetery assets directly to related parties in violation of N-PCL § 715. In July 2015, the Cemetery closed an interest-only loan of \$400,000 to the daughters of director Michael Michel. The loan was to be used for the development of a residential property in Queens and was formally agreed to by director Anthony Mordente, acting as attorney on behalf of the Cemetery, in a March 2015 loan commitment letter addressed to JLM LLC (Michel's daughters were Janine and Laura Michel). At the time Mordente executed the commitment letter, the property to be developed still belonged to Mr. Michel. There is no evidence that the Board considered this loan until June 2015, three months after his commitment letter, when Mordente first reported it to the Board as an already-agreed loan to two unidentified "borrowers who intend to build a house in Far Rockaway." Minutes from the June 2015 Board meeting do not record Board consideration of or inquiry into the loan terms or the borrowers' relationship to a sitting board member and they do not include a vote to approve the loan. Upon learning of the 2015 loan, Defendant and the other members of

the Board took no steps to examine whether the loan was appropriate and in the best interests of the Cemetery.

20. In July 2017, the Cemetery loaned \$500,000 to Defendant's brother, at Defendant's request. There is no record in the meeting minutes for June or September 2017 of the members of the Board considering the loan terms, addressing the identity of the borrower and resulting conflict of interest, or voting to approve the loan. Defendant and the other members of the Board took no steps to examine whether the July 2017 loan was appropriate and in the best interests of the Cemetery.

21. The Cemetery's 2015 and 2017 loans to the family relatives of two sitting directors together withdrew nearly \$1 million from the Cemetery's restricted trust assets for the personal use and benefit of related parties. The Cemetery files for these loans do not include any record of the individual members of the Board, including Defendant, considering investment alternatives or assessing the reasonableness of particular loan terms to the Cemetery as required by N-PCL § 715. The loans violated the plain terms of the Cemetery Conflict of Interest policy.

Professional Fees Paid to Sitting Directors

22. In the approximately 15 years that Defendant served as a member of the Cemetery Board, no one at the Cemetery ever requested information or documentation to support the amounts billed to the Cemetery for Defendant Anthony Mordente's legal work and no one disputed the total amounts billed. Defendant took no steps in his capacity as a Board member to ensure an objective determination by disinterested officers or directors that the amounts paid to Mordente for legal work on behalf of the Cemetery were fair, reasonable, and in the Cemetery's best interests.

23. Between 2013 and 2018, the Cemetery paid Mordente more than \$272,000 in professional fees at the same time that he was paid \$74,000 in director fees. Beginning in 2014, Mordente also received an annual salary of \$100,000 for his position as Cemetery CEO. Mordente received a salary raise two years later in December 2016. These payments, executed without any

substantive Board review, violated the terms of N-PCL Section 715 and the Cemetery's Conflict of Interest Policy.

24. Cemetery records indicate that during this same period time, Mordente also earned separate fees as Lender Legal Counsel at the Cemetery's mortgage loan closings. Those fees were deducted from the total loan proceeds paid to each borrower from restricted Cemetery assets at closing. Defendant never reviewed Mordente's role in these transactions or his associated fee during his tenure as a member of the Board.

Waste of Cemetery Assets

25. By 2013, the Cemetery's outside auditor had identified operating costs as a concern and made explicit recommendations to the Board that the Cemetery take steps to reduce administrative spending. Despite those warnings, during the last five years, the Cemetery's operating expenses have consistently increased without intervention by Defendant or other members of the Board.

26. In 2016, executive salaries, professional fees, director fees and office expenses for the Cemetery totaled approximately \$660,000 and consumed almost half (45%) of the total revenue from grave and niche sales for the year. In 2017, the same expenses totaled \$729,320 and represented 54% of the total revenue from grave and niche sales for the year. Defendant took no steps to review the reasonableness of the Cemetery payroll or office expenses during his tenure as a Director or, beginning in 2018, as Treasurer.

Invasion of the Perpetual Care Fund

27. The officers and directors of the Cemetery authorized regular incursions into the principal of its Perpetual Care Fund in recent years to support their overspending. This practice is expressly prohibited by the plain language of N-PCL Article 15.

28. N-PCL Section 1507(c) requires a cemetery corporation to keep, "separate and apart from its other funds, all moneys and property received . . . for the perpetual care of any lot,"

and it instructs in plain language that the contents of the Perpetual Care Fund represent assets held in trust, so that the income from those funds shall be used “solely for the perpetual care and maintenance of the lots” while the principal remains inviolate.

29. The Cemetery recites these restrictions annually in Note 1 to its Financial Statements. Note 1’s description of the Fund accounting used to segregate Cemetery assets states that: “The perpetual care fund consists of funds endowed to The Lutheran Cemetery for the annual care of graves. The principal of this fund is permanently restricted and only the income therefrom is applied against yearly maintenance charges.”

30. Despite their acknowledgment that Perpetual Care Fund assets exist solely for the benefit of individual subscription lots and may not be used for general administrative expenses, Defendant and all of the other officers and directors of the Cemetery routinely violated this prohibition between 2014 and 2018 by approving withdrawals from the Cemetery’s Perpetual Care trust accounts to fund, among other things, director meeting fees, scheduled deposits into the Cemetery’s general operating account, vendor bill payments, and union pension contributions.

31. The members of the Board, including Defendant, were informed of their obligation to refrain from spending Perpetual Care assets on ordinary administrative operating expenses and ignored multiple explicit warnings from the Cemetery’s outside auditor. In March 2012, then-Treasurer Donald Pfail reported to the other members of the Board, including Defendant, that the Cemetery’s General Fund — the unrestricted fund available to pay ordinary operating costs including salary, vendor expenses, utility costs, and machine repair — owed \$600,000 to the Perpetual Care Fund. In June 2013, Austin, Sr. reported a recommendation by auditor Andrew Muhlstock that the Board focus on growing its Perpetual Care Fund.

32. In March 2015, Mr. Muhlstock reported directly to the members of the Board, including Defendant, that the Cemetery “must decrease the amount of money withdrawn from the perpetual care fund to cover operating expenses.” Mr. Muhlstock’s warning is recorded in contemporaneous minutes created for the March 2015 meeting that were reviewed and adopted by

the members of the Board.

33. In March 2017, Mr. Muhlstock reported to the members of the Board, including Defendant, that the Cemetery's General (Operating) Fund "owe[d] the Perpetual Care Fund the approximate sum of One Million (\$1,000,000.00) Dollars." Mr. Muhlstock's warning is recorded in contemporaneous minutes created for the March 2017 meeting that were reviewed and adopted by the members of the Board.

34. In March 2018, Mr. Muhlstock "cautioned the Cemetery that it is drawing funds from the Perpetual Care Fund in an amount greater than it is permitted to take." Mr. Muhlstock's warning is recorded in contemporaneous meeting minutes created for the March 2018 Board meeting that were reviewed and adopted by the members of the Board.

35. The Cemetery Financial Statements for each of the years from 2014 to 2017 confirm the continued drain from the Perpetual Care Fund: the annual audited statement of Cemetery Assets recorded inter-fund receivable amounts owed to the Perpetual Care Fund of \$962,660 (2013), \$1.3 million (2014), \$977,363 (2015), \$1.19 million (2016) and \$960,021 (2017) for the years 2013 to 2017, respectively. The members of the Board, including Defendant, were responsible for reviewing and approving each of these Financial Statements.

Stipulated Legal Conclusions

36. Defendant, in his capacity as a director of the Cemetery, owed the Cemetery fiduciary duties of care, loyalty, and obedience. In addition, Defendant was a trustee pursuant to EPTL Section 8-1.4 because he administered property for charitable purposes in the State of New York.

37. Defendant admits that he violated his fiduciary duties to the Cemetery as a member of the Board of Directors when he failed to prevent an unlawful distribution of approximately \$900,000 to Daniel Austin, Sr. in May 2014.

38. Defendant further admits that he violated his fiduciary duties to the Cemetery as a member of the Board of Directors during the five years following Austin, Sr.'s resignation as President and CEO by failing to exercise even cursory oversight of the Cemetery's finances and by approving multiple transactions that violated the plain terms of the N-PCL and the Cemetery's own Conflict of Interest Policy.

39. Defendant further admits that he violated his fiduciary duties to the Cemetery as a member of the Board of Directors when he caused and/or permitted unlawful withdrawal of principal and income amounts from the Cemetery's Perpetual Care fund through a pattern and practice of transferring monies from the fund for use in meeting ordinary operating costs unrelated to the care of Cemetery lots associated with a perpetual care subscription.

40. Defendant further admits that the violations referred to in this section violated Sections 715, 717, and 1507 of the N-PCL and Section 8-1.4 of the EPTL and that, as a result of such violations, the Cemetery has been damaged.

Stipulated Relief

41. Defendant agrees that he will cooperate with the Attorney General fully and completely in the prosecution of the Action by the Attorney General against any other persons or entities connected with the Cemetery. Such cooperation shall include, among other things, voluntarily producing documents, meeting with the Attorney General to prepare for testimony, providing truthful testimony, including in pretrial depositions and at trial, and submitting truthful affidavits as requested by the Attorney General in connection with litigation concerning the Cemetery or any persons or entities connected to the Cemetery.

42. Pursuant to EPTL § 8-1.4(m) and N-PCL § 714, Defendant hereby accepts a permanent bar from service as an officer, director or trustee or in any position where he has any fiduciary responsibilities for any not-for-profit or charitable organization incorporated, registered, operating or soliciting contributions in New York, or for any other individual or entity that holds charitable assets or solicit charitable contributions in the State of New York, including, but not

limited to, responsibility for financial and/or management oversight of any New York charitable entity.

43. Defendant hereby agrees to pay restitution to the Cemetery in the amount of \$48,850 in director's fees earned during the period 2014 to 2019. Defendant further agrees that full payment of this restitution amount will be completed within sixty (60) days of the Effective Date of this Stipulation. Plaintiff shall deliver this restitution payment to the Cemetery as full compensation to the Cemetery for monetary losses and damages incurred as a result of the breaches of fiduciary duty outlined in paragraphs 37 to 40 above. It is further agreed by and among the Parties that, consistent with the principles outlined in General Obligations Law § 15-108(b) and CPLR 1402, Defendant's payment of this restitution amount will be deemed by the Parties to fully satisfy his liability for any and all monetary losses and damages incurred by the Cemetery as a result of Defendant's conduct. It is further understood by and among the Parties that Plaintiff will not seek additional recovery from any other defendant in this action for economic losses caused by Defendant's conduct.

44. Dismissal of lawsuit with prejudice. In consideration of the covenants undertaken herein, Plaintiff will discontinue the Action with prejudice against Defendant.

45. Resolution of all claims. This Stipulation resolves all outstanding claims by Plaintiff against Defendant. Plaintiff hereby agrees that it will seek no additional recovery or restitution of any kind from Defendant in connection with the Action, including but not limited to contribution under N-PCL Sections 719(c) and (d) for amounts recoverable from the remaining defendants in the Action subsequent to the execution of this Stipulation. Nothing in this Stipulation shall affect or limit Plaintiff's continuing claims against other defendants in the Action.

Additional Terms and Conditions

46. Defendant shall not take any action or make any statement denying, directly or indirectly, the propriety of this Stipulation or expressing any view that the Action is without a factual basis.

47. Plaintiff has agreed to the terms of this Stipulation based on, among other things, the representations made to Plaintiff by the Defendant and his undersigned counsel and the Attorney General's own factual investigation as set forth above. To the extent that any material representation made by the Defendant, directly or through his counsel, during the course of the Attorney General's Investigation and the Action, is later found to be inaccurate or misleading, this Stipulation is voidable by Plaintiff in its sole discretion.

48. No representation, inducement, promise, understanding, condition, or warranty not set forth in this Stipulation has been made to or relied upon by Defendant in agreeing to this Stipulation. Defendant hereby acknowledges that he has been duly represented by counsel in agreeing to this Stipulation.

49. In the event that one or more provisions contained in this Stipulation shall for any reason be held invalid, illegal, or unenforceable in any respect, in the sole discretion of Plaintiff, such invalidity, illegality, or unenforceability shall not affect any other provisions of this Stipulation.

50. If, for any reason, this Stipulation is voided or breached, Defendant agrees that: any statute of limitations or other time-related defenses applicable to the subject of this Stipulation and any claims arising from or related thereto are tolled from and after the date of this Stipulation. In the event this Stipulation is voided or breached, Defendant expressly agrees and acknowledges that this Stipulation shall in no way bar or otherwise preclude Plaintiff from commencing, conducting, or prosecuting any investigation, action or proceeding, however denominated, related to this Stipulation, against Defendant, or from using in any way statements, documents, or other materials produced or provided by Defendant prior to or after the date of this Stipulation.

51. If a court of competent jurisdiction determines that Defendant has breached this Stipulation, Defendant shall pay to Plaintiff the cost, if any, of such determination and of enforcing this Stipulation including, without limitation, legal fees, expenses, and court costs.

52. Plaintiff finds this relief and the agreements contained in this Stipulation appropriate and in the public interest. Accordingly, Plaintiff accepts this Stipulation in settlement of the claims asserted against Defendant in its Verified Complaint. This Stipulation shall be governed by the laws of the State of New York without regard to any conflict of laws principles.

53. Except as set forth above, the Parties hereto agree to bear their own fees, costs and expenses of this matter.

54. Nothing contained herein shall be construed to deprive any person of any private right under the law.

55. This Stipulation may be executed in counterparts, each of which shall be deemed an original and all or which taken together shall constitute one and the same agreement. Delivery by facsimile or electronic transmission in portable document format (PDF) of an executed counterpart of this agreement is as effective as delivery of an originally executed counterpart of this Stipulation.

56. All notices, reports, requests, and other communications to any party pursuant to this Stipulation shall be in writing and shall be directed as follows:

To the Attorney General:

Kate Suvari
Office of the Attorney General, Charities Bureau
28 Liberty Street, 19th Floor
New York, New York 10005
E-mail: Catherine.Suvari@ag.ny.gov
cc: Emily.Stern@ag.ny.gov

To Defendant Joseph Lodato:

c/o Jacques Catafago, Esq.
CATAFAGO FINI LLP
350 Fifth Avenue, Suite 7710
New York, New York 10118
E-mail: jacques@catafagofini.com

57. This Stipulation may not be amended except by an instrument in writing signed on behalf of all the Parties to this Stipulation.


IN WITNESS WHEREOF, this Stipulation is executed by the parties hereto on March 6, 2020 (the "Effective Date").

LETITIA JAMES
Attorney General of the State of New York

By: 

James Sheehan
Chief, Charities Bureau
28 Liberty Street
New York, New York 10005
Attorneys for Plaintiff


Joseph Lodato


Jacques Catafago
CATAFAGO FINI LLP
350 Fifth Avenue, Suite 7710
New York, New York 10118
Attorneys for Joseph Lodato

SO ORDERED:

O. Peter Sherwood, Justice of the Supreme Court of the State of New York